No. 8450

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administratrix of the Estate of Lorenzo N. Winslow, Deceased,

Appellants,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

FACTS.

Because neither the facts nor the law relied upon by the trial court when granting appellee's motion for a directed verdict in its favor are stated in appellants' brief, it becomes necessary here to so state them to that extent.*

The application for insurance signed by Leonard Winslow (Tr. 90) contained the following stipulation:

> "The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's con-

*All italics herein have been supplied.

tinuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; *except in case a conditional receipt shall have been issued as hereinafter provided.*"

Following this stipulation, the application contained fourteen numbered paragraphs containing certain information concerning the insurance applied for. The fourteenth numbered paragraph refers to the *conditional receipt* mentioned in the stipulation above quoted, as follows:

"14. $..... in cash has been paid to the Soliciting Agent and a conditional receipt No..... dated ....., signed by the Secretary of the Company, and countersigned by the agent has been issued making the insurance in force from such date, provided this application shall be approved."

Following these fourteen numbered paragraphs is another stipulation as follows:

"It is agreed that *no Agent* or other person except the President, a Vice-President, or a Secretary of the Company *has power* on behalf of the Company to bind the Company by making any promises respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, or modify any contract of insurance, or to extend the time for payment of a premium, or *to waive any* lapse or forfeiture or any *of the Company's rights or requirements.*"

Then comes the signature of the applicant, Winslow, and that of Moore, the agent.

The total annual premium on the policy amounted to $253.50 (Tr. 48). The application stipulated the premium was to be paid annually (Tr. 90, paragraph 9). Only $100 was paid by Winslow, for which Moore issued a receipt as follows (Tr. 89, Exhibit 1):

"253.50 Eureka, Calif. 12/14 1934.

Received from Leonard N. Winslow

One Hundred Dollars

To apply on 5000.00 20 yr. Endowment policy applied for in The Mutual Life Ins. Co. of New York this date.

$100.00 Fred J. Moore, Agent."

This receipt is admittedly not the receipt referred to in paragraph fourteen of the application; either in form or amount (Appellant's Brief, 7).

The application, unsigned, was first received in the San Francisco office of the appellee on December 15, 1934, but was returned to Moore because it lacked the signature of Winslow and was returned by Moore to the San Francisco office of appellee, signed by Winslow, on December 18, 1934 (Tr. 45, 46). Winslow had, however, signed the medical report on December 14, 1934 (Tr. 90). Winslow died on December 18, 1934. No money was sent with the application, nor until after December 20, 1934. On that day Moore wrote the San Francisco office as follows (Tr. 47):

> "Please send proof of death form for above party who was accidentally killed last evening as per newspaper clipping herewith. Also the above party applied for a $5000.00 20-year endowment Dec. 14, 1934. Applicant paid me $100.00, and had agreed to pay balance of premium within 60 days."

This was the first intimation that any money had been paid (Tr. 48).

Applications for insurance are considered and passed upon and policies issued only in the Home Office of the appellee in New York. Neither Moore nor the San Francisco office, nor anyone there, had any authority to do more than forward the application to New York (Tr. 47, 62). The application was forwarded to New York by the San Francisco office on December 18, 1934 (Tr. 47), the day Winslow died.

The actual authority of the soliciting agents of the appellee is contained in the "Agents Instruction Book". These rules with respect to the effectiveness of the insurance are, in part, as follows (Tr. 77, 83, 63):

> "The attention of Agents is particularly called to the clause in the application by which the applicant agrees that the insurance 'shall not take effect unless and until delivered to and received by the insured, the beneficiary, or by the person who herein agrees to pay the premium, during the insured's continued good health, and unless and until the first premium shall have been paid during the insured's continuance in good health.' *This applies to all cases except where the full premiums are paid in cash and conditional receipt issued and such premiums immediately forwarded to the Agency,* and suggests an argument for urging payment of premiums with the application."
>
> "130. Not to be delivered. A policy must not be delivered, nor the initial premium accepted, unless the applicant is in good health and his occupation as stated in application remains unchanged. This rule applies regardless of the fact that the

premium may have been previously collected. In any case of change in the applicant's health or occupation, the policy must be returned at once to the manager with a statement of facts, that he may ascertain from the company whether the policy should or should not be delivered, and if to be delivered, upon what conditions."

"Premiums Paid with Applications. *The company will not recognize initial premiums paid in advance of delivery of policies unless the full premium is paid in cash, a conditional receipt is issued, and the full premium is forwarded to the Agency.* When the full cash premium is paid at the time application is made, the amount must be entered in the portion of the application beginning 'Dollars ....., in cash has been paid to the Soliciting Agent', and the number of the conditional receipt noted in the proper space. Agents may accept initial premiums between the time application is made and the policy is delivered, provided that a conditional receipt is duly issued and further provided that the applicant has continued in good health and all other conditions, including applicant's application, having remained unchanged. *The full amount of the premium and a statement covering details of payment should be sent immediately to the Agency. Any representative who fails to comply with this rule will be liable to immediate dismissal.*"

It is true, Moore thought his authority a little broader than indicated by the rules of appellee; that is, he thought he could either pay the *full* premium himself or pay the *full* premium part in cash and part by note.

He testified (Tr. 78, 79, 80):

"Mr. Boland. Q. Is that credit equivalent to a note, or must you have a note?

A. A note——

Q. Without a note it is not good?

A. Cash or a note.

Q. Either cash or a note?

A. Yes.

Q. Didn't you get a note here?

A. No."

"Q. In view of the statement, have you ever done this before in which you have accepted extended credit for sixty days?

A. I have taken the notes or paid the premiums myself.

Q. Have you ever done it before where you didn't take a note, but did give credit?

A. Yes, by paying the premiums, myself. I explained in testimony this morning how I wrote this application."

"Where it is intended for the policy to go into effect the day that the applicant takes the medical examination, you either have to send the full premium in cash to the Agency Office or part cash and a note for the balance. That was your testimony, was it not?

A. Yes.

Q. And that is correct?

A. Yes.

Q. *So that in order to make the policy go into effect the day that the applicant takes the medical examination, the full premium must reach the Agency Office in San Francisco either in cash or cash and a note, that is correct?*

A. *Yes.*

Q. You did not receive a note in this case?

A. No.

Q. And you sent only the $100—Was all that was ever sent?

A. Yes."

Of course, it is nowhere claimed that the *full* premium was paid either in cash, or by Moore, or by cash and note.

There can be no claim of ostensible authority (California Civil Code, Sec. 2317), in view of the allegation of the complaint (Tr. 11), which alleges:

> "That said applicant did not at any time, have any knowledge or information as to said agent's authority to enter into any contracts for life insurance for or on behalf of said defendant, except the statements and representations of said agent with reference thereto, as herein set forth."

Appellant concedes that either actual or ostensible authority was necessary by the allegation of the complaint (Tr. 12), as follows:

> "That the said agent Fred J. Moore then and there had both actual and ostensible authority to make said contract of insurance for and on behalf of said defendant, as aforesaid."

Of course, no policy of insurance was issued, since news of Winslow's death reached San Francisco on December 20 (Tr. 47). In fact, there could be no assurance that a policy would ever be issued. Moore testified (Tr. 69, 70):

> "The fact a man pays me the full amount is no guarantee on my part I could assure him he would get a policy. That money could be returned for reasons I do not know anything about, and the

company would request I notify Mr. So-and-so the company declines the risk. I am not notified of the reasons."

It is pertinent to say that all conversations between Moore and Winslow occurred before the application was signed and sent to San Francisco (Tr. 42).

The $100.00 paid at the time of signing the application was tendered by Moore to appellant on December 26, 1934, and rejected (Tr. 42, 43).

Upon these facts the appellee moved the court to direct a verdict in its favor (Tr. 73-74), which motion was granted (Tr. 87).

THE ISSUES.

Upon the pleadings and the facts, we believe the issues are properly presented by the appellee's motion for directed verdict (Tr. 73), as follows:

"1. There is no evidence to sustain a finding or verdict that any contract of insurance or otherwise was entered into, as alleged in either the first or second count of the complaint.

2. Fred J. Moore had no power or authority to enter into any contract of insurance or otherwise on behalf of the defendant, as alleged in either the first or second count of the complaint.

3. Fred J. Moore did not purport or attempt to enter into any contract of insurance or otherwise on behalf of the defendant, as alleged in either the first or second count of the complaint.

4. The written application signed by Leonard N. Winslow was a written offer to enter into a

contract of insurance according to its terms, which offer was never accepted according to its terms.

5. No contract of insurance or otherwise, as alleged in either the first or second count of the complaint, could be effected until a policy was issued and delivered to Leonard N. Winslow during his continuance in good health, and no such policy was ever delivered.

6. No contract of insurance or otherwise, as alleged in either the first or second count of the complaint, could be effected unless the first premium thereon was paid in full during the good health of Leonard N. Winslow, and said first premium was not so paid in full.

7. There was no ratification of any act or offer or contract made, done or performed, or purported to be made, done or performed, by Fred J. Moore, by defendant, with respect to any of the matters alleged in either the first or second count of the complaint.

8. There was no estoppel of any act or offer or contract made, done or performed, or purported to be made, done or performed, by Fred J. Moore, by defendant, with respect to any of the matters alleged in either the first or second count of the complaint.

9. The delivery of a policy and the payment of the first premium conforming to the written application, was essential to any contract between said Leonard N. Winslow and defendant.

10. The death of said Leonard N. Winslow prior to the consummation of a contract by delivery of the policy and payment of the full premium, destroyed the subject matter of the negotiations for a contract."

SUMMARY OF ARGUMENT.

First: The authority of Moore as soliciting agent was severely limited by the written application. The policy could not go into effect until the application was accepted by the officers of the appellee and until the premium was paid during applicant's good health, unless the full premium was paid in advance and a conditional receipt, signed by the secretary, issued. Moore had no authority, actual or ostensible, to waive this condition or enter into any contract. Furthermore, all negotiations were merged in the application. The principles applicable have been so recently and exhaustively discussed by this and other courts, that appellee, in the interest of brevity, has omitted personal argument and merely cites and discusses these cases.

Second: Winslow had notice of these limitations because they were contained in the application. Failure to read the application is no excuse. It was Winslow's duty to read it.

Third: There was no intent or agreement that the policy should be effective immediately or until the application had been accepted and a policy had been issued and delivered, and the full annual premium paid.

ARGUMENT.

FIRST.

THE AUTHORITY OF MOORE AS SOLICITING AGENT WAS SEVERELY LIMITED BY THE WRITTEN APPLICATION. THE POLICY COULD NOT GO INTO EFFECT UNTIL THE APPLICATION WAS ACCEPTED BY THE OFFICERS OF THE APPELLEE AND UNTIL THE PREMIUM WAS PAID DURING APPLICANT'S GOOD HEALTH, UNLESS THE FULL PREMIUM WAS PAID IN ADVANCE AND A CONDITIONAL RECEIPT, SIGNED BY THE SECRETARY, ISSUED. MOORE HAD NO AUTHORITY, ACTUAL OR OSTENSIBLE, TO WAIVE THIS CONDITION OR ENTER INTO ANY CONTRACT. FURTHERMORE, ALL NEGOTIATIONS WERE MERGED IN THE APPLICATION. THE PRINCIPLES APPLICABLE HAVE BEEN SO RECENTLY AND EXHAUSTIVELY DISCUSSED BY THIS AND OTHER COURTS, THAT APPELLEE, IN THE INTEREST OF BREVITY, HAS OMITTED PERSONAL ARGUMENT AND MERELY CITES AND DISCUSSES THESE CASES.

In support of the motion for a directed verdict, appellee cited the court, and the court granted the motion upon the authority of, the following cases:

Bankers Reserve Life Co. v. Yelland (C. C. A., 9), 41 Fed. (2d) 684;

Jefferson Standard Life Ins. Co. v. Munthe (C. C. A., 9), 78 Fed. (2d) 53;

Braman v. Mutual Life Ins. Co. (C. C. A., 8), 73 Fed. (2d) 391;

New York Life Ins. Co. v. McCreary (C. C. A., 8), 60 Fed. (2d) 355;

Brancato v. National Reserve Life Ins. Co. (C. C. A., 8), 35 Fed. (2d) 612;

Toth v. Metropolitan Life Ins. Co., 123 Cal. App. 185;

New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. Ed. 934.

These cases so thoroughly cover all of the issues raised that independent and personal argument would seem unnecessary and are omitted in the interest of brevity.

The first case to be considered is the decision of this honorable court, in *Bankers Reserve Life Co. v. Yelland,* 41 Fed. (2d) 684. In that case Yelland was solicited for a policy of insurance in the appellant company. Whereupon he signed an application containing the following stipulation:

> "That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first premium, and delivery of the policy to the applicant in person, during his lifetime and while in good health."

This court also states:

> "In payment of the first premium thereon he executed his promissory note for $237.60 and delivered it to Hickman together with the application. Pursuant to the understanding then had, on November 26th, he submitted to a medical examination by a local physician duly designated by and acting for defendant. Seemingly the examination was satisfactory to the physician, but before either the application or medical report reached defendant's home office at Omaha, Neb., namely, on November 28th, Yelland died from injuries accidentally suffered on the preceding day."

At the time of the signature to the application, Yelland was hesitant. Whereupon the appellant's agent, as stated by the court, represented:

> "Well, it [insurance] will go into effect right now, providing you pass Dr. Rand's examination. There is no question about it."

For the purpose of the case the court was willing to assume that the agent had authority to make the representation and also that the agent's representation, but for the stipulation in the written application, would be effective. This court held that the claimant was bound by the stipulation in the application and that there was no equitable estoppel, saying:

> "Nor are we able to see of what avail to plaintiff the doctrine of equitable estoppel can be. In the first place, the transaction would seem to be wanting in the essential elements of estoppel. By the testimony it is shown that Yelland was disinclined to apply for insurance until he could conveniently spare the money for the first premium, and hence had it not been for Hickman's alleged representations he would have deferred making application, and consequently would have been without insurance at the time of his death. True, because of such representations he executed the note, but that was promptly tendered back by the defendant. How, then, can it be said that he acted upon the representations to the prejudice of himself or the plaintiff? But if on that point a different view could be taken, to recognize the doctrine as a sufficient basis for plaintiff's claim would in effect be to subvert the general rule that where parties have put their contracts into writing, the written instrument, if clear, is conclusive as against all preceding oral agreements and understandings. For it is to be presumed that in

> all cases where a party seeks to establish an oral agreement as against a subsequent writing, the alleged oral agreement is the more favorable to him."

Here the facts are analogous, because all negotiations and representations preceded the signature of the application (Tr. 42).

The case of *Braman v. Mutual Life Ins. Co.*, 73 Fed. (2d) 391, is identical with that before the court. It involves the same company, the same form of application and the same facts. In that case the court states:

> "An application for life insurance with double indemnity in case of accidental death was signed by Glenn D. Braman. There was testimony on behalf of plaintiffs, and as the court directed a verdict for the defendant, we must accept it as true, that Stockton and Gettman told plaintiffs, who were present at the time, and their son, that as soon as the premium was paid the insurance would be in effect, subject to the passing by the applicant of a satisfactory medical examination."

In connection with the application, applicant gave the soliciting agent his promissory note for the premium. The court then states the further fact:

> "The physical examination indicated that the applicant was an insurable risk. The papers were received at defendant's home office in New York City, December 23, 1931, and on that date the application was approved by defendant's home office without knowledge of the prior death of applicant. In the meantime, on December 22, 1931, and after he had learned of the death of applicant,

Gettman sent a draft for the amount of the first premium to the Sioux City office of defendant. This draft was returned to Gettman.

The application which was signed by Glenn D. Braman was on the printed form provided by the defendant, and recited that, 'The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary, or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided.'

Following this recital, appear fourteen paragraphs consecutively numbered.''

As stated, the application was the same as that here involved, and with reference to the *fourteenth* paragraph the court says:

''The fourteenth is as follows:

'$..... in cash has been paid to the Soliciting Agent and a conditional receipt No. ....., signed by the Secretary of the Company, and countersigned by the agent has been issued making the insurance in force from this date, provided this application shall be approved.'

Following the foregoing fourteen separately numbered paragraphs, the application contains provision that, 'It is agreed that no Agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respect-

ing benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.'

"Testimony on behalf of plaintiffs was to the effect that the agent Stockton said he did not have his receipt book with him, and on that account he made out a receipt on a piece of paper, using for the purpose the back of a blank check or note, and this was delivered to applicant. This receipt was not produced at the trial, but proper foundation being laid, secondary evidence was received as to its contents. In substance, *the receipt acknowledged receipt of the first annual premium, and recited that the policy would go into effect at once, or when the medical examination had been taken. It was not signed by the secretary of the company.*

At the close of all the testimony, the court directed a verdict for the defendant, and from the judgment entered thereon this appeal has been perfected."

The appellant contended that there was a completed policy of insurance. In that connection the court says:

"But it is to be noted that the application provides that the proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary, or by the person who therein agrees to pay the premiums during the insured's continuance in good health. This was a condition precedent to the taking effect of the policy unless, as we shall later consider, there was effected a contract of present insurance."

In holding there was no contract of insurance, the court first upholds the restriction upon the power of the agent, saying:

> "These restrictions on the power of the agent, being contained in the application signed, were notice to the applicant of the lack of authority of the soliciting agent to make any contract of insurance except as authorized by the provisions of the application itself."

The court then says:

> "It is therefore important to determine what authority to bind the company by a contract of interim insurance is conferred upon the soliciting agent by the application. All that is said on that subject is contained in the exception attached to the paragraph which precedes the numbered paragraphs in the application, and in paragraph 14 above quoted. After reciting that the proposed policy shall not take effect until delivered to and received by the insured during his continuance in good health, and until the first premium shall have been paid, the following exception appears: 'Except in case a conditional receipt shall have been issued as hereinafter provided.' The only provision referring to a conditional receipt is that contained in paragraph 14. Either this paragraph 14 contains the conditions under which interim insurance might be effected, or the application confers no authority whatever upon the agent to effect such interim insurance. Accepting, therefore, this paragraph 14 as containing such conditions, it is observed that (1) the first premium must have been paid in cash to the soliciting agent; (2) a conditional receipt signed by the secretary of the company and countersigned by

> the agent must have been issued; and (3) the application must have been approved. These were all conditions precedent, compliance with which was required by the company before it agreed to become a present insurer. New York Life Ins. Co. v. McCreary (C. C. A. 8), 60 F. (2d) 355, and authorities there cited."

With respect to the informal receipt, which was similar to but broader than the one here involved, the court says:

> "The applicant, however, did not receive a receipt signed by the secretary of the company and countersigned by the agent. Instead he received an informal receipt written out on the back of a blank check or promissory note, signed only by the soliciting agent. The only form of receipt which the agent, by the specific provisions of the application, was authorized to issue was one which had been signed by the secretary."

Further referring to the conditions in the application, the court says:

> "The next condition contained in the application is, 'provided this application shall be approved'. The offer of the defendant was not for present insurance, but an agreement to insure at some future time, to wit, on the approval of the application. Up to the time of the approval of the application there was no contract of insurance, and the company reserved the right to approve or reject the application. As said by us in an opinion by Judge Woodrough in Brancato v. National Reserve Life Ins. Co., 35 F. (2d) 612, 613:

'Binding receipts substantially like the one relied upon by the appellant have received frequent consideration by the courts, and it is settled that the right reserved to the insurance company to accept or reject the application for insurance referred to in the receipt is absolute. Such binding receipts leave it within the power of the company wholly to reject, without giving any reason, and the whole subject, both affirmatively and negatively, is within its choice and discretion. The matter was elaborately considered by the Supreme Court in the early case of Mutual Life Ins. Co. v. Young's Administrator, 90 U. S. (23 Wall.) 85, 106, 23 L. Ed. 152 (1874), and we can find no departure in the federal decisions from the conclusions there announced. The form of receipt under consideration in that case was not different in substance from the one involved in the present case, and the court held concerning it that—"The receipt of the 5th of June was the initial step of the parties. It reserved the absolute right to the company to accept or reject the proposition which it contained." ' "

Finally, the court holds:

"The only authority which the soliciting agent had in connection with the writing of interim insurance or issuing a conditional receipt was that contained in the application, and the terms and conditions there specified were in effect read into whatever receipt was given. The approval of the company was a prerequisite to the consummation of any contract of insurance, and the approval of the application, even though followed by the issuance of the policy after the death of the applicant, and without knowledge thereof, was certainly of

no effect. By the death of Glenn D. Braman the subject-matter of the contract of insurance ceased to exist."

"The application for insurance in the instant case, being subject to approval by the insurance company, was in effect an offer which was revoked by the death of the applicant, and his death destroyed the subject-matter of the offer."

"It follows that no contract of insurance ever became effective, and the lower court properly directed a verdict for the defendant. The judgment appealed from should, therefore, be affirmed."

The complete identity of the *Braman* case with the case now being considered is obvious. Each fact and point is thoroughly covered.

New York Life Ins. Co. v. McCreary, 60 Fed. (2d) 355, decided in the same circuit, is also identical in point of fact and law with the *Braman* and the instant case.

The California court has come to the same conclusion in the case of *Toth v. Metropolitan Life Ins. Co.,* 123 Cal. App. 185. Toth signed an application for insurance containing the usual clause to the effect:

"That no agent, medical examiner or any other person, except the officers of the company, have power on behalf of the company: (a) to make, modify or discharge any contract of insurance, (b) to bind the company by making any promises respecting any benefits under any policy issued hereunder * * *. That the company shall incur no liability under this application until it has

been received, approved, and a policy issued and delivered and the full first premium stipulated in the policy has actually been paid to and accepted by the company during the lifetime of the applicant, * * *."

It was claimed that the company's agent collected $5.00 on account of a premium of $33.30, and that the agent stated: "You will have to pay me a deposit of $5 on the premium and I will deliver the policy and you pay me the balance of the premium. As soon as you are examined by the doctor you are protected, if you don't have the money you have 60 days to pay it to me." It having been held that the $5.00 was paid it was contended that this created an oral contract of insurance. With respect to the authority of the agent, the court said:

"It is apparent from this evidence that neither Thomas nor any other person employed by defendant in the Bakersfield district had any authority whatever to make, on behalf of defendant, an oral agreement insuring the decedent's life. Defendant had the right to thus limit the authority of its soliciting agents and such a limitation of authority has been frequently upheld in this state. (Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 751 [13 L. R. A. (N. S.) 866, 91 Pac. 609]; 14 Cal. Jur., p. 460.) *A mere soliciting agent or other intermediary operating between the insured and the insurer has authority only to initiate contracts, but not to consummate them, and cannot bind his principal by anything he may say or do during the preliminary negotiations.* (14 Cal. Jur., p. 457; Browne v. Commercial Union

Assur. Co., 30 Cal. App. 547, 554 [158 Pac. 765]; Sharman v. Continental Ins. Co., 167 Cal. 117, 124 [52 L. R. A. (N. S.) 670, 138 Pac. 708].)"

The court concludes:

"The evidence in the case at bar shows without contradiction that Thomas was only a soliciting agent. He therefore had no authority to make any contract of insurance, either oral or written; and, even if we assume that he attempted to make an oral contract to insure decedent, his lack of authority so to do would prevent such purported oral contract from being valid or effective."

From the foregoing cases, particularly the *Braman* case, which concerned the same company, the same application and the same facts, it must be apparent that there could be no recovery upon any theory.

In the *Yelland* case it was contended or assumed that the application, supplemented by the alleged representations of the agent, constituted a contract. That contention this honorable court denied. In the *Toth* case it was contended that the agent had negotiated and consummated an oral contract. That contention the state court denied. In the *Braman* case, in addition to the representations, the application had, in fact, been approved, and it was asserted thereby an actual contract had been created. That was denied.

The weight and authority of these cases are sought to be overcome by the contention that they differ from this, in that in this case the applicant did not read the application. Now we answer that contention.

SECOND.

WINSLOW HAD NOTICE OF THESE LIMITATIONS BECAUSE THEY WERE CONTAINED IN THE APPLICATION. FAILURE TO READ THE APPLICATION IS NO EXCUSE. IT WAS WINSLOW'S DUTY TO READ IT.

Appellants state in their brief (p. 15):

> "The instant case is distinguishable from cases cited by insurer in its motion for directed verdict, in that in each of such cases there was no allegation or issue raised that insured had not read the application before signing it, that he had no opportunity to read it, and that he relied upon the agent to do all things necessary in so far as filling in application form and issuing proper receipt was concerned, and that it was the negligence, mistake and inadvertence of the agent that resulted in compliance, if any, with the company's rules. In the absence of such allegations and issue, it would be presumed that the applicant read the application and thus become bound thereby; but such cases are not applicable herein."

This is effectively answered in the following cases among many others:

New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934;

Toth v. Metropolitan Life Ins. Co., 123 Cal. App. 185;

New York Life Ins. Co. v. McCreary, 60 Fed. (2d) 355.

Upon this point the *Fletcher* case is particularly apposite. That case involved the avoidance of a policy for misrepresentations as to the health of the appli-

cant, contained in the application. It was contended that the applicant

> "had faithfully answered all the questions, but the agents inserted in the blank false answers; that he had no reason to suppose that the answers were taken down differently from those given; *that after answering all their questions he was asked to sign his name to the paper to identify him as the party for whose benefit the policy was to be issued and for that purpose he signed the paper twice, without reading it or the written answers; that the agents did not read to him any part of the application except the questions, and did not read the clause set forth in the defendant's answer,* nor call attention to the fact that his signatures were intended as an acceptance or assent to that clause; that when the policy was delivered to him he neither read it nor the copy of the application attached to it; that the agent who delivered it informed him that it was all right, and he was insured, and he gave no further attention to the matter; that the annual premiums, as they fell due, were paid to said agent, who received them with full knowledge of all the facts; and that, therefore, the Company was estopped from pretending that any of the answers as written rendered the policy void."

And the Supreme Court answered the contention as follows:

> "But the case as presented by the record is by no means as favorable to him as we have assumed. *It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all.* It would introduce great uncer-

tainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. *But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application,* and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the Company could in no respect be affected by his verbal statements or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The Company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. *It must be presumed that he read the application, and was cognizant of the limitations therein expressed.*"

In that case, as in this, the case of *Union Insurance Co. v. Wilkinson* (80 U. S. 222; 20 L. Ed. 617; App. Br. p. 22), and others of like character, were relied upon. In that respect the Supreme Court says:

> "The present case is very different from Ins. Co. v. Wilkinson, 13 Wall. 222 [80 U. S. bk. 20, L. ed. 617], and from Ins. Co. v. Mahone, 21 Wall. 152 [88 U. S. bk. 22, L. ed. 593]. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

Here, as in the *Fletcher* case, the authority of the agent was limited in and by the application itself. That application Winslow was "presumed" to have read. This word "presumed" is used in all later cases, but is defined by the Supreme Court in the quotation on the *Fletcher* case, to the effect that "it was his duty to read the application he signed". It is in that sense that it is used in the *Toth* case, where the court says as follows:

> "Moreover, the limitation of Thomas' authority as a soliciting agent of defendant was affirmatively brought to the attention of decedent when decedent made the application for insurance, which application contained the provision that no agent or any other person except officers of defendant company has power to 'make, modify or discharge any contract of insurance' or to bind the defendant in any way 'by making any promises respecting any benefits under any policy issued hereunder'; and also the provision that defendant would incur no liability under the application until it had been received, approved and a policy issued and delivered with a full first pre-

mium paid to and accepted by defendant. *The decedent signed the application and it is presumed that he knew its contents.* (Fidelity & Cas. Co. v. Fresno Flume & Irr. Co., 161 Cal. 466, 472 [37 L. R. A. (N. S.) 322, 119 Pac. 646].) By these provisions of the application express notice was given to decedent that the officers of the defendant reserved the exclusive right to determine whether or not defendant would insure him, and also that Thomas had no right or authority to bind defendant by any promises or purported oral agreements. (Iverson v. Metropolitan Life Ins. Co., supra.) *Thomas, therefore, had neither actual nor ostensible authority to make the purported oral contract relied upon by appellant and consequently no completed contract of insurance on the life of decedent, either oral or written, was ever entered into by decedent and defendant. An insurer is not bound by representations or purported agreements made by an unauthorized agent.* (14 Cal. Jur., p. 458; Fidelity & Cas. Co. v. Fresno Flume & Irr. Co., supra.)"

This honorable court also, in the *Yelland* case, 41 Fed. (2d) 684, took occasion to deny the application of the *Wilkinson* case to facts similar to this case. This court there said:

"Plaintiff's main reliance is upon a group of decisions involving the effect upon an issued policy, of untrue answers to questions put to the insured in connection with his application therefor. Of these the leading case, and the one most nearly in point in her favor, is Insurance Co. v. Wilkinson, 80 U. S. (13 Wall.) 222, 225, 20 L. Ed. 617. It has often been cited, sometimes followed, and not infrequently distinguished."

The group of decisions there referred to are similar to the group of decisions cited by appellant herein. This court, after discussing the *Wilkinson* case, says:

> "It may be that if there were herein involved the effect of a false answer descriptive of the risk, New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934, could be distinguished upon the same ground upon which therein the Wilkinson case was distinguished. *But we are considering here the effect, not of a false answer made as an inducement for the execution of the contract in suit, but of an express and unambiguous provision of the writing upon which plaintiff's cause of action is predicated.*"

The foregoing, we think, on the law, disposes of the appellant's contentions.

THIRD.

THERE WAS NO INTENT OR AGREEMENT THAT THE POLICY SHOULD BE EFFECTIVE IMMEDIATELY OR UNTIL THE APPLICATION HAD BEEN ACCEPTED AND A POLICY HAD BEEN ISSUED AND DELIVERED, AND THE FULL ANNUAL PREMIUM PAID.

Prior to December 14, 1934, Moore solicited Winslow for additional insurance (he already had a policy in appellee company, Tr. 29). At the time of such solicitation Moore testified (Tr. 35):

> "Leonard asked what the quarterly rate would be, and I told him it would be $67.20, and *we figured that out that it would be higher than an annual premium. To start it, he wanted to put it on the quarterly basis. I suggested that he take it*

annually, that the first year would be the hardest, and after that he could meet, and it is in line with the policy of our company to write as much annual business as possible, which is not only advantageous to the insured, but there is less chance of lapse, and it is less expensive detail to look after."

Now, what was meant by Moore was that there is an interest charge imposed upon the premium if paid upon a quarterly basis. Murray testified (Tr. 48):

"The premium that would have been due on this particular policy and application if issued, would be $253.50 on the basis of the annual payment of premiums. On the same application and policy the amount of quarterly premium due if the policy had been issued on that basis, would be 26½ per cent of the annual premium. By taking an annual premium rather than a quarterly premium, basis of payment, the policyholder would save at least six per cent per year. The quarterly premium payment that would have become due had the policy been issued on that basis would have been $67.18."

Consequently, it was evidently decided to put the policy on an annual basis and to save this interest charge. Moore testified (Tr. 82):

"Q. Isn't it also true in this particular instance that the insured, that is, Lorenzo Winslow, offered to pay the amount that would be necessary to make the policy effective immediately on the quarterly basis, and that would have amounted to some $67?

A. Yes.

Q. And that you told him he could make a saving by paying it on an annual basis, of about 6 per cent?

A. Yes."

This decision to put the premium on an annual basis and save the 6 per cent, so arrived at, for the reasons given, was actually carried out. In other words, the final intention and agreement was to put the policy on an annual basis. Moore collected $100.00 on account of the annual premium of $253.50, and not on account of a quarterly premium and gave Winslow a receipt as follows (Exhibit 1; Tr. 89):

"253.50 Eureka, Calif. 12/14 1934

Received from Leonard N. Winslow
One Hundred Dollars

To apply on 5000.00 20 yr Endowment policy applied for in The Mutual Life Ins. Co. of New York this date. $100.00

Fred J. Moore, Agent."

Even though this receipt, admittedly, is not in the form provided in the application (App. Br. 7; Tr. 64), nevertheless, if it had been intended to represent a quarterly premium it would have so stated.

This intent and agreement is further demonstrated by Moore's letter of transmittal, after Winslow's death (Tr. 47, 48):

"On December 20th a letter was received from Fred J. Moore of Eureka, the agent in this case, as follows: 'Please send proof of death form for above party who was accidentally killed last evening as per newspaper clipping herewith. Also

the above party applied for a $5000.00 20-year endowment Dec. 14, 1934. *Applicant paid me $100.00, and had agreed to pay balance of premium within 60 days'.* That was signed 'Fred J. Moore' and the case he was referring to was the Leonard Nathan Winslow case. Later the $100 was forwarded to our company. I have not the date here that the money was received."

To make the transaction perfectly clear, Moore explained the receipt and testified as to the agreement (Tr. 40):

"Mr. Nelson. The balance on this premium as indicated on the receipt, was some $153, was it not?

A. And fifty cents.

Q. How was that to be paid?

A. Within sixty days.

Q. He agreed to do that, did he?

A. He did.

Q. Was the offer of payment made to you afterwards?

A. It was. After his death. It was.

Q. You did not accept it?

A. I did not."

It is also significant that Attorney Nelson, almost two months after the death of Winslow, tendered the balance of the premium, and upon rejection deposited it in bank. Attorney Nelson said:

"Mr. Nelson. On February 11, 1935, I offered you the $153.50 and then in view of your refusal it was deposited with the Bank of Eureka to the credit of the Mutual Life Insurance Company of New York, after the company had written its refusal to accept the money.

> Mr. Boland. I admit that the offer was made, Mr. Nelson, and I assume that the deposit was made, although we never checked on it."

It is also significant that Moore had intended, himself, to advance for Winslow and pay the balance of the premium before the 25th of December. Moore testified (Tr. 79):

> "A. Our closing date is the 25th day of the month. The application was written on the 14th, and it was my intention to have done that very thing—pay it on the 25th. That is what I would have done.
>
> Q. You were going to pay the balance of that premium to the company within the sixty days, you, yourself, personally—is that correct?
>
> A. Yes.
>
> Q. And, therefore, you were relying upon him to reimburse you for that difference?
>
> A. Yes, sir."

If it had been the intent and agreement to put the policy upon a quarterly premium basis, so that it would have gone into effect immediately, subject to the approval of the application by the appellee:

1. Why did not Moore so specify in the application in the first place?

2. Why did not Moore correct the oversight when the application was returned to him for Winslow's signature (Tr. 33)?

3. Why did Moore not so state in the receipt (Tr. 89)?

4. Why did Moore not so state in his letter of transmittal, forwarding $100.00 (Tr. 48)?

5. Why was the balance of the annual premium of $153.50 tendered to appellee by Attorney Nelson on February 11, 1935 (Tr. 41), and then deposited in bank (Tr. 43)?

6. Why should Moore have intended to pay the balance of $153.50 himself, on or about December 25, 1934 (Tr. 79)?

Obviously, because the proposition to put the policy on a quarterly premium basis was first considered and then discarded in favor of putting it on an annual basis, and abandoning any intent to have the policy become effective immediately, provided the application was approved.

CONCLUSION.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
April 19, 1937.

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